Filed 5/18/09 Stevens v. Paul CA1/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| HENRY STEVENS,<br>Plaintiff and Appellant,<br>v.<br>YOLANDA PAUL,<br>Defendant and Respondent. | A122993<br><br>(San Francisco County<br>Super. Ct. No. GCG-07-463506) |

## INTRODUCTION

Plaintiff Henry Stevens appeals from an order of the San Francisco Superior Court filed September 17, 2008, granting defendant Yolanda Paul's motion for attorney fees incurred in connection with Stevens's appeal of Paul's successful anti-SLAPP motion. (Code Civ. Proc., §§ 425.16, subd. (c), 1032, subd. (a)(4); Cal. Rules of Court, rule 8.278(a)(1).)[1]

Stevens contends (1) the trial court erred in concluding Paul was the prevailing party on appeal, and (2) summary dismissal of the previous appeal without "reasons stated" violated article VI, section 14 of the California Constitution and prevented the determination that Paul prevailed on the appeal.[2] His claim is founded on the summary dismissal by Division One of this court of his appeal of the anti-SLAPP determination.

[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated. All references to rules are to the California Rules of Court, unless otherwise indicated.

[2] References to article VI, section 14 are to the California Constitution.

He argues that the summary dismissal was inconsistent with the requirements of article VI, section 14, that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Therefore, he asserts the summary dismissal of his appeal did not provide the basis for an award of attorney fees and costs on appeal (which included Paul's motion to strike his appeal, opposition to his petition for rehearing, and opposition to his petition for review in the Supreme Court). He further argues that the constitutional requirement for a statement of reasons is "in direct conflict with" section 425.16, subdivision (c), which provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."

We shall affirm the trial court's award of attorney fees for the previous appeal.

**BACKGROUND**

This is the third of three actions filed by Stevens in connection with seeking possession and/or ownership of property located in San Francisco, California that had been deeded to Paul by her mother, Stevens's wife. (See *Estate of Paul* (Nov. 7, 2008, A120879) [nonpub. opn.].)[3]

On August 1, 2006, Paul served Stevens with a "30 Day Notice of Termination of Guest Status." In response, Stevens filed a forcible detainer action against Paul (Super. Ct S.F. City and County, 2006, No. 06-619215). On May 2, 2007, the court granted summary judgment for Paul in the forcible detainer action. Judgment was entered on May 31, 2007. (See *Estate of Paul, supra,* A120879, at p. 2.) That judgment was not appealed.

[3] On August 10, 2006, appellant filed a petition for letters of administration in the probate division of the superior court (Super Ct. S.F. City and County, 2006, No. PES-06-289020). This action eventually resulted in a decision in favor of Paul with respect to Stevens's claims that the deed had been forged; that he had a community property interest in the property; that he adversely possessed the property and other claims going to the validity of the deed and the will executed by decedent. (*Estate of Paul, supra,* A120879, at pp. 1-2.) On November 7, 2008, we affirmed the judgment on appeal in a nonpublished opinion. (*Ibid.*)

On May 18, 2007, immediately following the court's grant of summary judgment for Paul in the forcible detainer action, Stevens filed the underlying action in the superior court (Super Ct. S.F. City and County, 2007, No. CGC-07-463506), alleging causes of action for elder abuse, wrongful eviction pursuant to the San Francisco Rent Stabilization and Arbitration Ordinance, intentional infliction of emotional distress, and negligence. Paul moved to strike all causes of action of the complaint as a SLAPP action. (§ 425.16.) Stevens moved for leave to file a first amended complaint to eliminate the other causes of action and to add a cause of action for adverse possession. On October 10, 2007, the trial court denied the motion for leave to file a first amended complaint and granted Paul's anti-SLAPP motion pursuant to section 425.16 ("Order granting defendant's special motion to strike first, second, third and fourth causes of action pursuant to CCP § 425.16"). On November 5, 2007, judgment on the motion was entered, ordering that Stevens shall recover nothing against Paul and that, pursuant to section 425.16, subdivision (c), Paul shall recover against Stevens costs of suit pursuant to a cost memorandum and attorney fees to be determined on noticed motion. On November 9, 2007, Paul served Stevens with a notice of entry of the judgment. On November 26, 2007, Paul filed her motion for attorney fees and a cost memorandum. Stevens opposed the motion for fees, arguing that Paul failed to properly notice her application for fees and did not identify the person against whom she sought fees. Following a hearing on January 3, 2008, the court granted Paul's motion for attorney fees and expenses under section 425.16, subdivision (c), in the amount of $5,155.00 and costs of $375.00. Also on January 3, 2008, an amended judgment was filed, inserting the foregoing amounts as the reasonable attorney fees and costs awarded Paul against Stevens. Nothing in the record indicates that in opposing the motion for attorney fees and costs, Stevens ever raised an objection to the *amount* of fees or costs awarded.

On February 4, 2008, Stevens purported to appeal the amended judgment entered on January 3, 2008. Paul moved to dismiss the appeal primarily on grounds that it was untimely filed. She also argued that Stevens had never objected to the amount of the fees in the trial court and so had waived his right to raise the fee issue on appeal. On April 23,

2008, Division One issued an order granting Paul's motion to dismiss the appeal and dismissed the appeal without a written statement of reasons (*Stevens v. Paul* (Apr. 23, 2008, A120588). On May 5, 2008, the court denied Stevens's petition for rehearing and request for publication. On July 9, 2008, the Supreme Court summarily denied Stevens's petition for review. (See *Estate of Paul, supra,* A120879, at p. 3.) The remittitur was issued by this court on July 14, 2008. The remittitur provided that Paul was to recover her costs on appeal.

On August 19, 2008, Paul moved the superior court for attorney fees incurred on appeal, pursuant to section 425.16, subdivision (c). On September 17, 2008, the court granted the motion, recognizing Paul as a prevailing party under section 1032, subdivision (a), rule 8.278(a)(1), and *Liu v. Moore* (1999) 69 Cal.App.4th 745, 754-755. The court awarded attorney fees incurred on appeal of $9,387.50.

On September 22, 2008, Stevens filed a notice of appeal of the September 17, 2008 fee award order. On January 27, 2009, Division One denied Paul's motion to dismiss the appeal, her related motion for sanctions, and Stevens's cross-motion for sanctions, ordering that any renewed motion for sanctions pursuant to rule 8.276 (b)(2), shall be deferred until disposition of the appeal upon the merits. On February 20, 2009, the matter was transferred to this division.

## DISCUSSION

### I.

As a threshold matter, this appeal of the September 17, 2008 order awarding fees on appeal is timely. (§ 904.1, subdivision (a)(2); see *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 993, fn. 7; *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 661 [where notice of appeal from the underlying anti-SLAPP order would be untimely, court considered timely appeal of the reasonableness of the amount of fees under abuse of discretion standard].) However, only the issues of Paul's entitlement to fees on appeal may be raised on this appeal. Appellant did not argue below and does not argue here that the *amount* of the fees awarded for the appeal was incorrect. He has therefore waived any such challenge here.

This appeal does not resurrect the merits of the underlying action or the grant of the anti-SLAPP motion or the fees initially awarded by the trial court in connection with pursuing the anti-SLAPP motion in the trial court. Stevens appears to concede that Paul prevailed on her anti-SLAPP motion and is entitled to the $5,155 fees and $375 costs incurred on that motion in the trial court. (§ 425.16.) Nor does this appeal provide a platform for challenge of Division One's previous summary dismissal of the appeal of the trial court's anti-SLAPP determination and initial fee award.[4] Those determinations are final.

The involuntary dismissal of an appeal operates as an *affirmance* of the judgment, leaving it intact. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 5:48, p. 5-20; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005.) "An ordinary dismissal leaves the judgment as if no appeal had been taken. [Citations.]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 762, p. 835.) The dismissal is with prejudice unless *expressly* made without prejudice to another appeal. (§ 913; Eisenberg et al., *supra*, ¶ 5:48, p. 5-20; 9 Witkin, *supra*, § 762, p. 835.)

**II.**

The crux of Stevens's argument on appeal is that the trial court erred in determining that Paul was the prevailing party for purposes of the appeal and in awarding attorney fees on appeal where the appellate court dismissed his appeal without a written opinion stating reasons. He contends article VI, section 14's requirement that "[d]ecisions . . . that determine causes shall be in writing with reasons stated," "conflicts irreconcilably in the context of summary dismissal of an appeal with [section] 425.16, [subdivision] (c)'s requirement that *only a* 'prevailing' party is entitled to fees on appeal." We disagree.

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[4] We therefore reject appellant's attempt to reargue on this appeal that his notice of appeal filed February 4, 2008 was timely filed. In his reply brief, appellant seeks not only reversal of the award of fees on appeal, but also reversal of the judgment dismissing the underlying complaint. He requests that we direct the superior court to entertain his motion to file a first amended complaint. We refuse.

The California Constitution provides that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Art. VI, § 14.)[5] However, as Witkin recognizes, "[t]he key word in the constitutional provision . . . is 'causes.' This has been interpreted to mean decisions on the merits *of a case proper for determination.* [Italics added.] Hence, the following do not require written opinions: [¶] (1) *Dismissal or Decision on Other Motion.* An order dismissing an appeal or original proceeding. The order may be accompanied by a written opinion but often is merely a minute order. (See *People v. Brown* (1957) 149 Cal.App.2d 175, 176.)" (5 Witkin, Cal. Procedure, *supra,* Appeal, § 780, pp. 849-850.) Similarly, denials of petitions for rehearing or for review in the Supreme Court are made without a written opinion. (*Ibid.*) "It has been the accepted practice for both the Supreme Court and the District Courts of Appeal to grant motions to dismiss appeals from the bench without written opinion. The justification for this procedure is that in dismissing an appeal the court determines that the 'cause' is not properly before it." (*People v. Brown,* at p. 176.) Consequently, an untimely appeal is not a cause proper for determination and it must be dismissed as the court has no jurisdiction to entertain it. The dismissal may be without a written opinion. Clearly, there was no requirement, constitutional or otherwise, that the Court of Appeal issue a written statement of reasons in connection with its dismissal of the prior appeal.[6]

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[5] Article VI, section 14 provides in its entirety: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. [¶] Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

[6] In *In re Rose* (2000) 22 Cal.4th 430, the California Supreme Court held its summary denial of review of a State Bar Court recommendation of disbarment was not a cause within the meaning of article VI, section 14, which requires that causes before the court be in writing with reasons stated. (*In re Rose,* at p. 436.) Justice Kennard disagreed. (*Id.* at p. 460 (dis. opn. of Kennard, J.).) However, even in dissent, Justice Kennard acknowledged that dismissal of an appeal did not trigger the constitutional requirement of a written opinion. She explained: "There is another group of rulings that have the effect of terminating a judicial proceeding in an appellate court but nonetheless

Stevens's reliance upon *People v. Kelly* (2006) 40 Cal.4th 106 is misplaced. There our Supreme Court held that "a decision affirming a judgment in a *Wende* [7] appeal . . . *dispose*[*s*] *of a* '*cause*' within the meaning of article VI, section 14 of the California Constitution, and [therefore] must do so 'in writing with reasons stated.' " (*People v. Kelly*, at p. 120, italics added.) The cause in a *Wende* appeal is properly before the appellate court, unlike an untimely or otherwise improper appeal.

The prevailing party in an anti-SLAPP motion is statutorily entitled to attorney fees on appeal. "Section 425.16, subdivision (c) provides that '[i]n any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.' The statute includes fees and costs incurred in defending an unsuccessful appeal of an order granting a special motion to strike. (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 20; *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448 [(*Wilkerson*)].) The provision for fees and costs 'is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating [himself or itself] from a baseless lawsuit.' (*Id*. at p. 446.)" (*GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 910.)

Nor does it matter that the appellate court did not issue a written opinion or determine the merits of the appeal. *Wilkerson, supra,* 99 Cal.App.4th 443, is analogous. There, the appellate court held that the defendant was entitled to attorney fees on appeal of an order granting the defendant's motion to strike the plaintiff's complaint as a SLAPP suit pursuant to section 425.16, despite the voluntary dismissal by the plaintiff of the appeal before briefing. (*Id.* at p. 446.) The plaintiff argued that the trial court could not determine which party would have prevailed on appeal in the absence of a determination

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do not trigger the written opinion requirement. In this category are rulings denying rehearing, *dismissing an appeal*, or declining to issue a writ of review, alternative writ, or order to show cause. *In each instance, the ruling indicates a decision by the appellate court not to intervene and not to disturb an existing order or judgment that is itself enforceable.*" (*In re Rose*, at p. 463 (dis. opn. of Kennard, J.), italics added.)

[7] *People v. Wende* (1979) 25 Cal.3d 436.

of the merits of the appeal. The appellate court rejected the plaintiff's attempt to compare the plaintiff's voluntary dismissal of an appeal from an order granting an anti-SLAPP motion (and awarding attorney fees) to that of a voluntary dismissal in the trial court of an action with an anti-SLAPP motion pending. (*Id.* at p. 447.) "In the former circumstance, the trial court has ruled on the motion to strike on the merits and concluded that the action was a SLAPP suit, thus entitling the defendant to recover attorney fees in connection with the motion. The dismissal of an appeal from the trial court's determination leaves intact the judicial finding that the action was a SLAPP suit (Code Civ. Proc., § 913; *Conservatorship of Oliver* (1960) 192 Cal.App.2d 832, 836-837), which in turn entitles the defendant to recover fees under section 425.16. [Citation.]" (*Wilkerson*, at p. 447.) According to *Wilkerson*, "the courts have consistently interpreted section 425.16 to authorize the recovery of attorney fees and costs incurred in defending against an unsuccessful appeal from an order granting the anti-SLAPP motion. [Citations.] We discern no reason for denying a recovery of attorney fees and costs on appeal simply because the plaintiff decides not to pursue the appeal to final determination." (*Id.* at p. 448.)

There is no substantive difference for purposes of this appeal between the voluntary dismissal without issuance of an appellate opinion on the merits in *Wilkerson*, and the dismissal of the appeal with no written opinion here.

Other statutes and rules are in accord that "prevailing party" may include a "defendant in whose favor a dismissal is entered." (§ 1032, subd. (a)(4).) Rule 8.278(a)(2) provides with respect to costs on appeal that "[t]he prevailing party is the respondent if the Court of Appeal affirms the judgment without modification *or dismisses the appeal.* . . ." (Italics added.) "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." (Rule 8.278(d)(2).)

Stevens further contends that Paul did not prevail on appeal, because dismissal without a written opinion prevented her from achieving her litigation objectives. He argues that because the dismissal without opinion did not determine the merits of the

appeal, it is not afforded law of the case effect and is therefore no bar to his continuation of the action in the trial court. "The doctrine of 'law of the case' deals with the effect of the first appellate decision on the subsequent retrial or appeal. The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (5 Witkin, Cal. Procedure, *supra,* Appeal, § 459, p. 515; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893.) In the absence of a written opinion with a statement of reasons, an appellate opinion by definition is not afforded law of the case status. (See *Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1185-1186 [law of the case doctrine did not apply in the same litigation where no *appellate* court ever actually determined the question]; cf., *Kowis v. Howard*, at p. 901 [summary *denial* of a motion to dismiss an appeal does not establish law of the case for purposes of later Supreme Court review of the appealability of the judgment].)

That does not mean that Paul did not achieve her litigation objectives. Indeed, she received a final judgment in her favor and a fee award below. The judgment was effectively "affirmed" by dismissal of the appeal and issuance of the remittitur after exhaustion of Stevens's appellate remedies.

Nor does the inapplicability of law of the case doctrine to Division One's dismissal of the previous appeal mean that Stevens can continue this action in the trial court. The underlying determination is final and will be afforded res judicata or collateral estoppel effect, should Stevens attempt via a new proceeding to relitigate these claims or the issues necessarily decided in the action below. Insofar as this specific underlying action is concerned, the case is as final as if Stevens had never appealed. "[A] prior appealable order becomes 'res judicata' in the sense that it becomes binding in the same case if not appealed (*In re Matthew C.* (1993) 6 Cal.4th 386, 393; *Reeves v. Hutson* (1956) 144 Cal.App.2d 445, 451 . . .)." (*Lennane v. Franchise Tax Bd., supra,* 51 Cal.App.4th at pp. 1185-1186.)

Paul was the prevailing party in both the trial court and on appeal. She was statutorily entitled to her attorney fees in connection with Stevens's appeal in the underlying action.

**DISPOSITION**

The order awarding Paul her attorney fees on the prior appeal of the grant of the anti-SLAPP motion is affirmed. Paul is awarded her costs and attorney fees in connection with this appeal as well.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.